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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October 1994

Larry James Champion and Oscar Jones, Petitioner

vs.

United States Department of Labor, et. al., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Larry James Champion
22 Brooks Road
Tuskegee, AL 36083
(334) 727-5624

Oscar Jones
Post Office Box 1234
Tuskegee Institute, AL 36087
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53 pp

QUESTION PRESENTED

The key issue is whether or not a citizen is entitled to access of contracts and documents on file with the United States government and its agencies, namely the Department of Labor (DOL) and General Service Administration (GSA). Does violation of this right also constitute a violation of due process of law and equal protection of the law as granted in Articles V and XIV under the Bill of Rights of the Constitution of the United States? Do wholesale prices exempt a public utility company from paying overtime under the stipulation in 40 USC 327-333?

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NO. _____

_____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

_____

_____

Larry James Champion and Oscar Jones, Petitioners

vs.

United States Department of Labor, et. al, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Larry James Champion and Oscar Jones, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit reverse its decision to produce pertinent records.

OPINIONS BELOW

On June 9, 1986, the United States Department of Labor (DOL) entered a decision that our former employer, a public utility

corporation was not subject to the provisions of a government contract under the Service Contracts Act. (Appendix A)

On the dates of inception of employment with Tuskegee Utility Board (TUB) GSA contract No. GS-008-02331 and prior contracts were concealed. Petitioners Champion and Jones received the contract from GSA, the Respondent, September of 1990 under 41 USC Chapter 60-22.21 dissemination of the policy. GSA contract No. GS-008-0233 overtime policy was not disseminated. 40 USC Sec. 330, states that any officer or person designated as inspector of work to be performed under any contract of the character specified in Sections 103 [40 USC Sec 329].... upon observation or investigation "report all violations."

Petitioners reasons for filing complaint against TUB is untimely for the simple reason that Jones and Champion had no prior knowledge of the contract. Had these matters of the law been given consideration, there probably would have been a different result in this case.

> 5 USC Section 552 (a)[2] requires that agencies make available for public inspection or copying release pursuant to a request for access from "any person."

91 USC Section 1491 is committed to exclusive jurisdiction of the court of claims. EEOC opinion "founded upon Constitution, or any act or congress, or any regulation of an executive department.

Records should reflect that US OFCCP Regional Director Carol Gaudin, US DOL Area Directors Tucker and Gilbert and Contracting Officer Mayor Johnny Ford were well knowledgeable of overtime requirements. They are the culprits in the violations of their required obligated duties.

In accordance to US DOL Area Director Tucker's Assessment TUB was not covered under a Service Contract Act. (Appendix A) In contrast US DOL Holt's denial or investigation is that wholesale prices were equal, therefore, no investigation was necessary. (Appendix B)

Petitioners "...express a belief, based on reasoned and studied professional judgment, that this appeal involves one or more precedent-setting questions of exceptional importance."[1]

In addition, the purpose of this petition is to direct the court's attention to some matter of law which "... has so far departed from the accepted and equal course or judicial proceedings ... as to call for an exercise of this court's power of supervision" [2] in deciding this case.

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[1] US Court of Appeals for Federal Circuit, Rule 19 (b).0
[2] Supreme Court Rules, Rule 17 (a).

JURISDICTION

This court has jurisdiction over this action under 5 USC Section 552 (a)(2) (the FOIA), and 28 USC Section 1331 (Federal question jurisdiction).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V and Amendment XIV in the United States Constitution are set forth in Appendix J.

STATEMENT OF THE CASE

TUB hired persons to work at the City of Tuskegee (Alabama) Water Filtration Plant. Each employee worked twelve hour shifts putting in one twenty-four hour week and one sixty hour week. Rather than pay the twenty hours overtime for the long week, the City chose to average the hours between the two weeks and pay only two hours overtime for each week. This practice resulted in cheating each employee out of sixteen hours overtime for each biweekly pay period.

Meetings with those in authority yielded no satisfactory results, and several employees entered into a law suit. Harassment from superiors on the job caused several to withdraw

their names from the case. However, Jones and Champion chose to continue their plight.

On October 31, 1991 C. V. Action 91-V-132-E was filed in the United States District Court. The Middle District of Alabama had jurisdiction pursuant to 40, 327-333, and maintained under Title VII of The civil Rights Act of 1964, as amended and 42 USC Section 2000 (e). On November 18, 1991, Respondent Tuskegee Utility Board filed, and on November 26, 1991, Federal Respondents EEOC et, al. filed their motion to dismiss. On January 2, 1992, the United States Department of Labor filed their motion.

On March 3, 1992, the Honorable Judge Robert Varner dismissed the case on the grounds that plaintiffs did not have private cause of action under 40 USC Sections 327-333 and because plaintiffs failed to file an EEOC complaint. (Appendix C)

Plaintiffs allege that defendants have not monitored contracts, and false information has been received regarding the forms and conditions of the TUB contract.

Plaintiffs further aver that federal defendants allegedly discriminated against Black persons because of their not recognizing the rights and privileges of Black employees employed at the earliest date of February 1977 to the present time.

On April 20, 1992, plaintiffs filed notice to United States Court of Appeals for the Eleventh Circuit. On the 26th day of July 1993 plaintiffs filed motion for order compelling production of compliance records. (Appendix G)

On October 4, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's opinion. (Appendix H)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for several reasons. Petitioners Champion and Jones filed an EEOC Complaint on August 10, 1991 (Appendix C) stating that respondents US DOL failed to investigate citing Inland Service Corporation and Weldon Smith[3] under FOIA and to produce records 41 CF-250.26(a). Plaintiffs failed to file a timely complaint. (Appendix D, E, F) US DOL investigated for compliance for violations of 40 USC 327-333 and 41 USC Section 351 and in contrast US DOL Area Director Tucker and Holt and Gilbert and Ford failed to investigate and Gaudin failed to perform their obligated duties. (40 USC. Section 330)

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[3] Inland Service Corporation and Weldon Smith v. the United States, No. 37-81C, September 10, 1982.

Clearly, there are material factual matters in dispute which must be resolved. Consequently, there should be no summary judgment. Plaintiffs have not had any opportunity to probe and the administrative records show no input.

"In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency actions, findings, or conclusions found to be ... obtained without procedures required by law. Rules or regulations having been followed...."[4] In this unique case, it is apparent neither the US DOL et al. and TUB nor the District Court of Appeals was concerned about the compliance records because if they had done so, they would have discovered that respondents have violated various laws.

There is no case law wherein public utility (TUB) contractor for nearly twenty years has been successful in not paying overtime.

One of the reasons the congress mandated creation and preservation of federal and presidential recourse was to ensure that private researchers and historians would have access to the documentary history of the federal government.[5]

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[4] 5 USC, Section 7703

[5] 44 USC, Sections 2101-2118, 2201 et seq., 2901-2910, 3101-3107, 3301-3324.

One outcome of Nippert v. United States Court of Appeals, Fifth Circuit was that the FOIA is designed to promote disclosure and information and therefore the Act is to be construed with the view to disclosure, not secrecy, and exemptions from it are not to be read broadly.[6]

Federal Home Loan Mortgage Corporation appealed from a judgment of the United States District Court for the District of Columbia holding that it was subject to the disclosure and reporting requirements of the Freedom Information Act. The Court of Appeals held that the FHLMC was an "agency," subject to the disclosure and reporting requirements of the Act.[7]

Although documented requests were made for the disclosure of said records, no action was taken one way or the other. In Webb v. Department of Health and Human Services, et al. it was found that failure to defend constitutes waiver of confidentiality defense, and from such point on, manufacturer bears burden of proving that information is covered by such exemption.[8]

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[6] Shanland Water and Supply Corporation, Plaintiff-Appellant v. John R. Block, Individually and as Secretary of U. S. Department of Agriculture, and J. Leon Futch, Individually and as State Director of the Farmers Home Administration, Defendants-Appellees, and Dieter Nippert and Wife, Intervenors-Appellees. No. 84-2536. United States Court of Appeals, Fifth Circuit.

[7] James Rocap v. Victor H. Indiek and Federal Home Loan Mortgage Corporation, Appellants. No. 75-1906. United States Court of Appeals, District of Columbia Circuit. Decided June 21, 1976.

[8] 5 USC, Section 552(b)(4).

In Kissinger V. Reporters Committee for Freedom of the Press et al the Court recognized that requesters are entitled to prevail in the FOIA action if the State Department "has improperly withheld agency records."[9]

Two rulings of Eric Schwartz v. Internal Revenue Service are as follows: Federal material may not be withheld under FOIA exemption for interagency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.[10] It was also inferred that the government must disclose purely factual material appearing in a form that is severable without compromising the private remainder.[11]

Information should be made available on request on the following conditions:

> (a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 USC 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest

[9] Kissinger v. Reporters Committee for Freedom of the Press et al. Certiorari to the United States Court of Appeals for the District of Columbia Circuit. No. 79-1088. Decided March 3, 1980.
[10] 5 USC, Section 552(b)(5).
[11] Ibid.

> and does not impede any of the functions of the OFCCP, except in the case of records disclosure of which is prohibited by law.
>
> (b) Consistent with the above, all contract compliance documents within the custody of the OFCCP shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCCP must be disclosed include, but are not limited to:...
>
> (3) Text of final conciliation agreements...
>
> (5) Dates and times of scheduled compliance reviews.[12]

As a result of Vaughn v. Rosen, it was affirmed by the Court of Appeals that the evaluation reports, dealing with compliance of federal agencies with policies set down by statute, executive order and Commission regulations and with such programs as equal employment opportunity, labor-management regulations and employment ... were not exempt from disclosure under the FOIA section exempting matters "related solely to the internal personnel rules and practices of an agency."[13]

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[12] Section 60-40.2.

[13] Robert C. Vaughn v. Bernard Rosen, Executive director, U. S. Civil Service Commission, et al., Appellants. No. 75-1031. United States Court of Appeals, District of Columbia Circuit. Decided November 21, 1975.

CONCLUSION

Simply and humbly stated, the case was incorrectly decided and is not consistent with federal laws and Constitutional Rights, namely Amendment V and Amendment XIV to the United States Constitution.

On the 10th day of October 1991, US DOL Regional Director Gaudin failed to notify Champion and Jones the requestors the right to appeal adverse determinations to the head of US DOL. (Appendix F)

Champion and Jones cite 5 USC Section 552 (a)[6][A][1]. Requestors need not pursue administrative appeals in order to exhaust administrative remedies where agency fails to require an appeal. Our United States Constitutional Rights have been violated, namely the fifth and fourteenth amendments.

On the 17th day of 1992, the court orderd a pretrial hearing for the 1st day of October, 1992. (Appendix H) However, the court dismissed our case. We feel that due process was violated under the order issued by Judge Varner. We asked the United States Court of Appeals for the Eleventh Circuit to produce compliance records from the respondents. (Appendix G) They affirmed the order of the District Court. (Appendix I) Here again, due process of law was not granted.

Humbly we request to see Compliance Records submitted by Tuskegee Utility Board and a reversal of the lower court's decision.

Respectfully submitted,

Larry James Champion
22 Brooks Road
Tuskegee, AL 36083
(334) 727-5624

Oscar Jones
Post Office Box 1234
Tuskegee Institute, AL 36087
(334) 727-4441

U. S. DEPARTMENT OF LABOR

MONTGOMERY, AL 36104

June 9, 1986

Dear Mr. Champion:

This is about the employment Information Form you recently submitted concerning your former employment at Tuskegee Utility Board, Tuskegee, Alabama. You stated that you were a water plant operator at the water plant which filters and purifies the water for the City of Tuskegee. You stated you were not paid proper overtime pay and you were not paid the prevailing wage-rate under a Federal contract.

Based on the information you furnished, you were employed by the city of Tuskegee in a position which provided traditional government services from 1976 until November 1985. The 1985 amendments to the Fair Labor Standards Act provides that the overtime provisions of the Act will apply to local government employees, engaged in traditional government services, effective April 15, 1986. Your work, therefore, was not subject to the overtime provisions of the law during your employment for the City of Tuskegee.

Your employment at the water plant which supplies water to the Veterans Administration Hospital in Tuskegee was not

subject to the provisions of a government contract under the Service Contracts Act.

I'm sorry, but we are unable to be of assistance to you in this instance.

Sincerely,

James A. Tucker

Area Director

U. S. DEPARTMENT OF LABOR

ATLANTA, GE 30367

Dear Mr. Champion:

This is in reply to your Employment information Form (WH-3) recently submitted to our Montgomery Wage and Hour Office. You stated that you were employed by the Tuskegee Utility Board and did not receive overtime pay while working on a federal contract subject to the Contract Work Hours and Safety Standards Act (CWHSSA).

The Contract Work Hours and Safety Standards Act requires overtime to be paid to all laborers and mechanics employed on work done under contract for or with financial aid of the United States. However, there is an exemption from the payment of overtime under Section 103 of CWHSSA (copy enclosed) with respect to the purchase of materials or supplies that are ordinarily available in the open market.

It appears from the minutes of the council meeting furnished with the complaint, that the water purchased under this contract with the Veterans Administration was available and sold to other wholesale customers at the same price.

In view of the exemption under Section 103 of the Act, we plan no action on your inquiry. I regret that we cannot be of assistance in this matter.

Appendix B

Sincerely,

George R. Holt

Regional Wage Specialist

Enclosure

Route 3, Box 183

Tuskegee, AL 36083

August 10, 1991

Ms. Mary Fagin, Administrator

Office of Federal Contract Compliance

1375 Peachtree N.E.

Atlanta, Ga 30367

Introduction

Larry James Champion and Oscar Jones are former Water Plant Operators, employed between 1976 and 1985, by Tuskegee Utility Board to perform hourly services.

The United States of America, acting through the Administrator of General Services (GSA) for Public Utilities Services Division issues contracts to provide water services for Federal

Veterans Affairs and the Department of Defense , to only name a few.

Tuskegee Utility Board, a Minority Water Corporation, has a contractual agreement with the GSA to provide water services for Tuskegee VA Medical Center, Tuskegee, AL 36083.

The United States Department of Labor, Atlanta's Wage and Hour Specialists, Mr. George Holt, is of the belief that Tuskegee Utility Board is exempted from paying overtime. (please see Mr. Holt's letter).

Secondly, Mr. James A. Tucker, a former Area Director for the United States Department of Labor, Montgomery, AL was of the belief that Tuskegee Utility Board which supplies water to the Veterans Administration Hospital in Tuskegee was not subject to the provisions of a government contract under the Service Contract Acts.(please see Mr. Tucker's letter).

On the 24th day of July 1991, Mr. Wesley Humbert, a Montgomery, AL (GSA) Field Officer reviewed Tuskegee Utility Board's Contract #GS-00B-02331, and was of the belief that Tuskegee Utility Board must comply to the agreements in the contract for overtime payments, and that wholesale prices has no effect on the overtime requirements, and that the United States Department of Labor in Montgomery or Atlanta should enforce violations for overtime payments. (please see contract).

Henceforth, if the Tuskegee Utility Board is exempted from paying overtime payments under section 103 of The Contract Work Hours And Safety Standards Act.(40 U.S.C.327, et.seq.); then what was the exception for the remaining class of water employees receiving overtime under similar contractual terms and conditions specified and attached as GSA

1685. 1685-A Nos. 1-3? At other VA locations? (Please see VA locations).

We, aver that there is a large class of water employees that received overtime.

Complaint

Larry James Champion and Oscar Jones, aver that the United States of America and certain agencies of the United States Department of Labor, allegedly discriminates against Black persons because of their race by promoting the policy of no coverage for Tuskegee Utility Board and its employees providing hourly services for Tuskegee VA Medical Center and on the contrast, other Utilities Corporations and Employees providing the same services were protected and recognized. We further aver that the GSA and the U.S. Department

of Labor and Tuskegee Utility Board has a contractual responsibility to protect employees providing services for the United States Government under a precise contract.

In conclusion, we aver that our civil rights have been violated under Title VII of th Civil Rights Act of 1964.

Sincerely,

Submitted by:

Larry J. Champion
Route 3,Box 183
Tuskegee, AL 36083
205-727-5624

and

Oscar Jones
P.O. Box 1234
Tuskegee Inst., AL 36088
205-727-4441

DEPARTMENT OF LABOR

ATLANTA, GA 30367

September 24, 1991

Re: Complaint against Tuskegee Utility Board

Dear Mr. Champion:

This letter is in reference to the complaint you filed against the above employer under the provisions of 41 CFR 60-250.26(a). The OFCCP regulation implementing this Act states that complaints must be filed within 180 days of the date of the alleged violation unless the time for filing is extended for good cause shown.

We are sorry to inform you that our records reflect that you failed to file your complaint within 180 days of the alleged violation and have not demonstrated good cause for an extension. Accordingly, we have closed your complaint. If you have additional evidence that you believe would show good cause for your delayed filing, you must present such evidence to this office within 15 calendar days of the date you receive this letter.

We regret we cannot be of further assistance.

Any questions concerning this matter should be addressed for the attention of Patsy Lisvey, Complaint Monitor, 404/347-4310.

Appendix D

Sincerely,

Carol A. Gaudin

Regional Director

Route 3. Box 183

Tuskegee. ALa 36083

October 1. 1991

U.S. Department of Labor

OFCCP

1375 Peachtree St. N.E.

Atlanta. GA 30367

Dear Mr. Jenkins:

This letter is in reference to your September 24, 1991 letter. OFCCP records reflect that we failed to file our complaint within 180 days of alleged violations.

We are requesting under the Freedom of Information Act to receive copies of these records, that relect that we failed to submit our alleged violation of discrimination timely.

Appendix E

Also, we are requesting records from OFCCP that excluded Tuskegee Utility Board, GSA, Public Utilities Service Division and the U.S. Department of Labor from not properly complying with OFCCP policies and regulations.
(records from 1980 until present time).

Henceforth, we are requesting that additional time be allowed beyond the 15 day period, until such time we receive copies of the requested records.

Sincerely yours,

_____

Larry J. Champion

_____

Oscar Jones

U. S. DEPARTMENT OF LABOR

ATLANTA, GA 30367

October 10, 1991

FOIA-IV-DB-055-CY91

Dear Mssrs. Champion & Jones:

On October 3, this office received for processing your request under the Freedom of Information Act (FOIA), for copies of records that reflect that you failed to submit your alleged violation of discrimination timely. Additionally, you requested records from OFCCP that excluded Tuskegee Utility Board, GSA Public Utilities Service Division and the U. S. Department of Labor from not properly complying with OFCCP policies and regulations.

A review of our records revealed the complaint filed against Tuskegee Utility Board was received in our Regional Office August 19, 1991. The complaint for indicated the date of the alleged discrimination occurred March 1980. You were advised that our regulations precluded further processing of this complaint for being untimely unless extended for good cause. Further review revealed OFCCP does not have jurisdiction over the entity about which you complained.

Enclosed are 30 pages from your file representing all documents pertaining to this matter in response to your request.

We have also included a copy of the regulations for your review. Key areas are paper clipped for your convenience.

This concludes our processing of your FOIA request.

Sincerely,

Carol A. Gaudin

Regional Director

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 92-6339

D.C. DOCKET NO. 91-V-1320-E

July 26, 1993

Larry James Champion)
and)
Oscar Jones, et al)
Plaintiffs- Appellants)
vs.)
U.S. Department of Labor,)
et al.,)
Defendants - Appellees)

MOTION FOR ORDER COMPELLING PRODUCTION

Come now appellants, Larry James Champion and Oscar Jones, et al, acting pro se, move this Honorable Court for an order requiring the appellees, Tuskegee

Utility Board and its Attorneys of Record, Ernestine Sapp and Fred D. Gray, Langford, McGowan and Gray to produce to the Court all Federal records submitted to the area and regional office of Federal contract compliance from 1980 until present time, that purports that Tuskegee Utility Board has been in compliance.

1. Area Office
   Employment Standards
   Administration
   Office of Federal Contract
   Compliance
   2015 Second Ave., North
   Suite 202
   Birmingham, AL 35203

2. Regional Office
   Office of Federal Contract
   Compliance
   1375 Peachtree N.E.
   Atlanta, GA 30367

Respectfully Submitted,

_____

Larry James Champion

Pro Se Appellant

_____

Oscar Jones

Pro Se Appellant

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Larry James Champion and Oscar Jones	]	
Plaintiffs	]	CIVIL ACTION NO.
vs.	]	91V-1320-E
U. S. Department of Labor, et al	]	
Defendants.	]	

ORDER

A pretrial hearing of this cause is tentatively scheduled for the 1st day of October, 1992, in Opelika, Alabama, and this cause is tentatively set for trial during the two-week term of Court commencing on the 16th day of November, 1992, in Opelika, Alabama.

Under Rule 16, Federal Rules of Civil Procedure, as amended, the Court is required to set a schedule for discovery and the filing of motions. Accordingly, it is ORDERED by this Court as follows:

1. Any dispositive motions, i.e., motions to dismiss or for summary judgment, shall be filed no later than SEVENTY-FIVE (75) DAYS from the date of this Order.

2. All discovery shall be completed on or before TWO WEEKS PRIOR TO THE PRETRIAL HEARING, except that, as to

any witnesses whose names are not revealed until the last day allowed under Paragraph 3 or whose names are not revealed with sufficient time for the opposing party to take a deposition prior to the pretrial conference, the opposing party shall have the time extended in this paragraph to allow for deposing such witnesses.

3. No later than TWO WEEKS PRIOR TO THE PRETRIAL HEARING, the parties shall exchange the names and addresses of all witnesses whom they expect to offer at trial. Each party must provide all . . . .

8. No later than SEVENTY-FIVE (75) DAYS from the date of this Order, counsel for all parties shall file a jointly signed letter with the Court advising the Court that counsel for all parties have engaged in a good faith settlement conference and inform the Court as to the reasonable possibilities of settlement.

If any party has any objection to these deadlines, the party should inform the Court within 14 days from the date of this Order; otherwise, the Court will assume that the deadlines are agreeable to all parties. Unless this Order be hereafter modified by Order of the Court, the provisions hereinabove set out are binding on the parties.

DONE this 17th day of March, 1992.

R. E. Varner

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Larry James Champion; et al	)	
	)	
Plaintiffs	)	CIVIL ACTION NO.
	)	
vs.	)	91V-1320-E
	)	
U. S. Department of Labor, et al	)	
	)	
Defendants.	)	

OPINION

This cause is now before the Court on the Defendants' various Motions to Dismiss filed herein November 18, 1991, December 26, 1991, and January 2 and 16, 1992, and on the materials submitted in support of and in opposition thereto. This Court has jurisdiction pursuant to 28 U.S.C. Sec 1331.

On October 30. 1991, the Plaintiffs filed a pro se Complaint against Defendants for violations of the Fourteenth Amendment; for violations of the Contract Work Hours and Safety Standards Act, 40 U.S.C. Sec. 327-333; for violations of Title VII of the Civil Rights Act of 1964, as amended [42 U.S.C. Sec. 2000(e)]; and for breach of a contract between Defendants, Tuskegee Utility Board and General Services Administration [GSA], to which the Plaintiffs claim they are third-party beneficiaries. The Plaintiffs allege that the Defendants breached a water service contract when they failed to pay

any witnesses whose names are not revealed until the last day allowed under Paragraph 3 or whose names are not revealed with sufficient time for the opposing party to take a deposition prior to the pretrial conference, the opposing party shall have the time extended in this paragraph to allow for deposing such witnesses.

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DONE this 17th day of March, 1992.

R. E. Varner

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Larry James Champion; et al	]	
	]	
Plaintiffs	]	CIVIL ACTION NO.
	]	
vs.	]	91V-1320-E
	]	
U. S. Department of Labor, et al	]	
	]	
Defendants.	]	

OPINION

This cause is now before the Court on the Defendants' various Motions to Dismiss filed herein November 18, 1991, December 26, 1991, and January 2 and 16, 1992, and on the materials submitted in support of and in opposition thereto. This Court has jurisdiction pursuant to 28 U.S.C. Sec 1331.

On October 30. 1991, the Plaintiffs filed a pro se Complaint against Defendants for violations of the Fourteenth Amendment; for violations of the Contract Work Hours and Safety Standards Act, 40 U.S.C. Sec. 327-333; for violations of Title VII of the Civil Rights Act of 1964, as amended [42 U.S.C. Sec. 2000(e)]; and for breach of a contract between Defendants, Tuskegee Utility Board and General Services Administration [GSA], to which the Plaintiffs claim they are third-party beneficiaries. The Plaintiffs allege that the Defendants breached a water service contract when they failed to pay

Plaintiffs for wages due under that contract; that the United States Defendants have failed to monitor this contract; that the United States Defendants have discriminated against blacks employed from February, 1977, to the present; and that the Defendants have not paid Plaintiffs overtime that is required under the Contract Work Hours and Safety Standards Act [hereafter Act]. For the following reasons, this Court is of the opinion that the complaint should be dismissed with prejudice.

All defendants have presented various reasons why the Plaintiffs complaint should be dismissed. Each contends that the complaint fails to state a claim for which relief may be granted. Under Federal Rule of Civil Procedure 12(b), the Court may treat these motions as summary judgment motions where the ground for dismissal is based on the Plaintiff's failure to state a claim and where the Court considers matters filed outside the pleading. The Court will not consider any matters filed outside the pleading, however, because it finds that the complaint on its face fails to state a claim for which relief may be granted.

Standards. "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King, 467 U.S. 69, 73 (1984). Furthermore, a court must construe all facts in favor of the plaintiff when determining

whether a complaint fails to state a claim for relief. See Schuer v. Rhodes, 416 U.S. 232, 236 (1974). Allegations in a pro se complaint are also held to less stringent standards than those in a complaint prepared by an attorney. See Wright v. Newsome, 795 F.2d 964, 967 (11th Cir. 1986).

Discussion. The Court considers the dispositive issues to be whether the Plaintiffs have a private cause of action under the Contract Work Hours Standards Act, whether the Plaintiffs have a cause of action under Title VII against any agency other than their employer, whether the Plaintiffs' cause of action against their employer under Title VII fails because the Plaintiffs have not alleged that they filed an EEOC Complaint, and whether the Plaintiffs have stated a cause of action against the United States over which this Court has jurisdiction. With these dispositive issues in mind, the Court will address the allegations against each of the Defendants.

I. DEFENDANT EVAN J. KEMP [EEOC]. The Plaintiffs allege no actionable wrong by the EEOC or by Defendant Kemp. Defendant Kemp contends that the Plaintiff fails to state a claim against him because the only right the Plaintiff has under Title VII is against his employer. The Defendant also contends that state action is required if the Plaintiff is alleging a violation of the due process clause under the Fourteenth Amendment.

Construing the Plaintiff's Fourteenth Amendment claim as due process claim under the Fifth Amendment, Defendant Kemp urges that several courts have reasoned that a Plaintiff is not denied due process in the EEOC's processing of his EEOC claim because the Plaintiff is entitled to a trial de nova in federal court.

The Court agrees with Defendant Kemp that Congress has not provided the Plaintiff with a cause of action against the enforcement agency–the EEOC–for wrongs committed by the employer or for the EEOC's processing of a complaint. See Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) ("relief granted under Title VII is against the employer") [emphasis original]; Gibson v. Missouri Pac. R.R., 579 F.2d 890, 891 (5th Cir. 1978), cert. den., 440 U.S. 921 (1979) (Title VII *** confers no right of action against [the EEOC]". Construing the pro se Complaint liberally as stating a cause of action against the EEOC under the Fifth Amendment, rather than the Fourteenth Amendment, this Court finds also that the Plaintiffs have failed to state a cause of action because they do not allege that they have ever sought the processing of a complaint by the EEOC.

II. DEFENDANTS TUSKEGEE UTILITY BOARD, ELRICK HARRIS, FRANK BENTLEY, AND JOHNNY FORD. As grounds for barring the Plaintiffs' cause of action, these Defendants rest

on the res judicata and collateral estoppel theories,[1] on the Plaintiff's action being barred by the statute of limitations, on the Plaintiff's failure to exhaust administrative remedies, and on this Court's lack of jurisdiction.

This Court finds the dispositive issues to be whether the Plaintiffs have a private cause of action under the Contract Work Hours Standards Act and whether the Title VII claim is deficient because Plaintiffs have not alleged that they have filed an EEOC complaint and received a right to sue letter.

Contract Work Hours and Safety Standards Act [hereafter the Act]: The court concludes that the Plaintiffs have no private cause of action for overtime compensation under the Act 40 U.S.C. Sec. 327-333. This Court cannot recognize a cause of action for an employee to sue his employer for violations of the Act because this statute does not expressly permit such an action. See United States v. Cooeletti Bros., 621 F.2d 1309, 1312 (5th Cir. 1980); Rogers v. Frito-Lay, Inc. 611 F.2d 1074,

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1 The Plaintiffs appear to be, in substance, seeking the same kind of relief as that sought in previous suits referred to by these defendants and by the United States defendants. While Plaintiffs' most recent suit may be barred by res judicata or claims preclusion, the Court will not reach this issue because of its dismissal of the Complaint on other grounds and because the issue must be properly raised by motion for summary judgment since ruling on the motions to dismiss. See Moch v. East Baton Rouge Parish School Bd., 548 F.2d 594, 596 n.3 (5th Cir.), cert. denied, 434 U.S. 853 (1977); 18 C. Wright, R. Miller, and E. Cooper, Federal Practice & Procedure Sec 4405 (2d ed. 1980).

1078 911th Cir.), cert. den. 449 U.S. 889 (1980); Vanzant v. Asphalt Products, Inc., 100 Lab Cas. (CCH) Paragraph 34,523 (N.D. Ala. 1984). A court can judicially infer a cause of action, however, if the court finds that Congress intended one. Id.

The factors this Court must consider in deciding whether Congress intended that a private cause of action exists under the Act is (1) whether the plaintiff is among the class benefited by the statute; (2) whether the legislative history indicates a congressional intent to create a cause of action for this class; (3) whether such cause of action would be consistent with the purpose for the legislation; and (4) whether such cause of action is one more appropriately a matter for state law. See Cort v. Ash, 422 U.S. 66, 78 (1975); Capeletti Bros., 621 F.2d at 1313; Boggers, 611 F.2d at 1078.

The only case in this Circuit that appears to have applied these factors to the Act is Vanzant v. Asphalt Products, Inc., 100 Lab. Cas. (CCH) Paragraph 34,523 (N.D. Ala. 1984). In concluding that no private cause of action exists for employees to sue their employers under the Act, the district court in Vanzant relied on Capeletti, 621 F.2d 1309. Capeletti reached the same conclusion as to the Davis Bacon Act, and Act with provisions similar to the Act. See Vanzant, 100 Lab. Cas. at 46,140; Capeletti, 621 F.2d at 1314-15.

The Court agrees with the district court in Vanzant that Congress intended that there be only one remedy under the Act--"an administrative enforcement scheme." Vanzant, 100 Lab. Cas. at 46,140. This scheme provides for an administrative determination of any unpaid overtime wages , withholding by the government of these unpaid wages from the contract, and payment of these wages by the government directly to the employees. Id., [citing 40 U.S.C. Sec. 330(a)]. The scheme also provides for a "right of action or intervention" by the employee, but only when the money the government withholds in insufficient to cover the amount due all the employees. Id., [citing 40 U.S.C. Section 330(b)]. An employee's private cause of action against his employer would be inconsistent with this administrative enforcement scheme and its remedial purpose. See Vanzant, 100 Lab Cas. at 46,140. Also the federal nature of the contract forecloses a finding that such cause of action is one more appropriately a matter of state law. Id. While the Plaintiffs may be members of a class benefited by the Act, the Plaintiffs have not stated a cause of action under the Contract Work Hours and Safety Standards Act against these defendants.[2]

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[2] The Plaintiffs attach to their response a copy of a letter they received on December 6, Id. This Court is without jurisdiction to review this finding because the instant suit is not one attracking the final decision of a federal agency. See U.S.C. Sec. 702, 704; Moon v. U. S. Department of Labor, 747 F.2d 599, 602 n.7 (11th Cir. 1984)

Third Party Beneficiaries: The Plaintiffs also appear to seek enforcement of the contract's provisions as third-party beneficiaries. The plaintiff in Vanzant advanced the same theory for recovery under the Act, which the district court rejected. Vanzant, 100 Lab. Cas. at 46,140-41. The Court agrees with the district judge in Vanzant that Congress intended to preempt any state remedies with the administrative enforcement scheme under 40 U.S.C. Sec. 330. This Court finds that the Plaintiff has failed to state a cause of action as a third party beneficiary to the contract between its employer and the federal government.

Title VII Claim: The Plaintiffs' Title VII claim against these Defendants also fails. While the filing of an EEOC complaint is not a jurisdictional prerequisite to a Tittle VII action in federal court, this filing is a condition precedent. See Zipes v. Trans World Airlines, 455 U.S. 385 (1982); Patterson v. McLean Credit Union, 491 U.S. 164, 180-81 (1989); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1009-10 (11th Cir. 1982). A plaintiff must therefore allege as a condition precedent to filing a

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1990, from Defendant George Holt with the U. W. Department of Labor concerning their complaint about not receiving overtime payments under the CWHSSA for the work performed for their former employer. (Plaintiff's Response, Exhs. D-F). Mr. Holt concluded that the contract for water supply to the Veterans Administration Hospital was exempt under Section 103 of the CWHSSA.

suit under Title VII that an EEOC charge has been filed. See Jackson, 678 F.2d at 1010; Fed. R. Civ. Pro. 9(c). Once the defendant challenges the absence of this condition precedent, the plaintiff bears the burden of establishing that the condition has been met. Id. The Plaintiffs have failed to meet this challenge because they have not alleged the exhaustion of this administrative remedy. They have failed to state a claim under Title VII.

III. Remaining Defendants [Martin, Tucker, Gilbert, Gaudine, Brown, Barton, Moreau, and Humbret].[3] These Defendants contend that the complaint should be dismissed because the Court lacks subject matter jurisdiction, because the action is barred by the statute of limitations,[4] because the action is barred by sovereign immunity and because the complaint fails to state a claim. The Court finds the dispositive issues to be

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3 These defendants are sued in their official capacities and are referred to in the complaint as "United States defendants" or "Federal Defendants." The Complaint is one against the United States and its agents acting in the scope of their authority.

4 The action may be time barred by the general six-year statute of limitations for claims against the United States. See 28 U.S.C. Sec. 2401(a) (1988). The Plaintiffs filed their complaint on October 30, 1991; yet the last day that either Plaintiff probably worked more than eight hours a day without compensation may have been April 19, 1985. (App. A, Memorandum Brief of Defendant for summary judgment; and the Court will not consider it here because the complaint will be dismissed on other grounds and because the Court will not consider matters outside the pleadings. See 5A C. Wright and A. Miller, Federal Practice and Procedure Sec. 1360 (2d ed. 1990); supra note 1.

whether this Court has jurisdiction over the claims alleged against the United States and whether the Plaintiffs have stated a claim against the United States.

Contract Work Hours and Safety Standards Act (the Act): This Court lacks subject matter jurisdiction over the Plaintiffs' overtime claims because the United States[5] has not consented to be sued by an employee of an independent contractor for compensation of overtime hours worked on a federal project. See Ware v. United States, 626 F.2d 1278, 1286 (5th Cir. 1980). Under the Act, the government agency withholds funds from the contractor for sums administratively determined to be due laborers and mechanics for unpaid wages, but this Act does not subject the United States to liability for any unpaid wages that the contractor must pay his workers of for any deficiencies in funds withheld for compensating these workers. See 40 U.S.C. Sec. 328(b)(2); 330(a).

The Plaintiffs allege also that "the United States Defendants have not monitored contracts, and false information has been received regarding the terms and conditions of the

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5 See supra note 3.

contract from the Tuskegee Utility Board." (Complaint, Causes of Action Paragraph 2). The Plaintiffs have no standing to sue the United States for a breach of a contract to which they are not in privity with the government See Fairchild Industries, Inc. v. United States, 620 F.2d 807, 809 (Ct. Cl. 1980).

Additionally, neither the Administrative Procedures Act nor Tucker Act grants jurisdiction to this Court to hear a claim for compensatory damages against the Government exceeding $10,000. See U.S.C. Sec. 702, 704; 28 U.S.C. Sec. 1346(a)(2); 1491.[6] Jurisdiction of such claims lie, if at all, in the United States Claims Court under 28 U.S.C. Sec. 1491.

Title VII Claim: The Plaintiffs fail to state a claim against the United States under Title VII. The Plaintiffs allege that "the Federal Defendants allegedly discriminates against black persons because of their not recognizing the rights and privileges of black employees employed at the earliest date of February 1977 to the present time." (Complaint, Causes of Action Paragraph 1). Under Title VII, the action of the employee has is one against his employer. See Busby v. City of Orlando, 931 F.2d 764, 772 (11th

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[6] The letter the Plaintiffs received from Defendant George Hold is not a final agency decision properly before this Court. See supra note 2.

Cir. 1991]. The Government is not a worker's employer merely because the worker is doing work for a contractor who is performing work under a federal contract. Furthermore, any Title VII claim the Plaintiffs might have against the United States is due to be dismissed because the Plaintiffs have not alleged that they filed a complaint with the EEOC, a condition precedent to any action under this Title for discrimination (See discussion in Part II above.)

Conclusion. All of the defendants are entitled to have the complaint against them dismissed with prejudice. This Court repeats what U. S. District Judge Hobbs of this District stated when he dismissed a former complaint filed by Plaintiff Champion in Civil Action No. 88-H-279-N against some of the defendants in the instant suit:

> "Because Plaintiff is proceeding pro se, the Court wishes to state that plaintiff's prior lawsuit cannot be 'appealed' or 'reopened' by just filing another lawsuit. Once a lawsuit is finished at the district court, a party may appeal the action of the district court directly to the court of appeals by filing a notice of appeal with the Clerk of the district court. Unless the appellate court grants relief from the action of the district court, a party may not relitigate the issues." [Ex. I, Motion to dismiss filed November 18, 1991, by Defendants, Tuskegee Utility Board, et al] [emphasis added].

This Court sees no way that the Plaintiffs can at this time recover for the alleged wrongs that they claim. As indicated in

the case of Patterson v. Aiken, 841 F.2d 386, 387 (11th Cir. 1988), and in the recent order entered in the many cases filed in the Northern District of Alabama by Lord Keenan Kester Cofield versus various officials,[7] harassing litigation after matters have been litigated will not continue to be tolerated, even for pro se litigants. It appears that Plaintiff Champion has been litigating these issues for years and that his co-plaintiff, Plaintiff Jones, has been involved in at least one of these prior suits. Such an harassment of the parties and such stress on the over-crowded court dockets will not be tolerated further. The much abused pauper rights of access to courts delays litigation for all. Delay of justice sometimes defeats justice for all.

An Order will be entered this date dismissing this proceeding with prejudice.

DONE, this 26th day of March, 1992.

R. E. Varner

UNITED STATES DISTRICT JUDGE

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7 See Northern District of Alabama order, dated March 10, 1992, entered in Civil Action Numbers 90-AR-2486-S; 90-AR-2545-S; 90-AR-2546-S; 91-AR-3001-S; 92-AR-007-S; and 92-AR-0068-S.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Larry James Champion; et al	)	
	)	
Plaintiffs	)	CIVIL ACTION NO.
	)	
vs.	)	91V-1320-E
	)	
U. S. Department of Labor, et al	)	
	)	
Defendants.	)	

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the Defendants' various Motions to Dismiss filed herein November 18, 1991, December 26, 1991, and January 2 and 16, 1992, be, and the same are hereby, GRANTED and the above-styled cause is hereby DISMISSED with prejudice, with costs taxed against the Plaintiffs, for which execution may issue.

DONE this 26th day of March, 1992

R. E. Varner

United States District Judge

Appeal from the United States District Court

for the Middle District of Alabama

October 4, 1994

Before CARNES and BARNETT, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

United States Constitution

Amendment V: "Nor shall any person be deprived of life, liberty, or property, without due process of law...."

Amendment XIV: "No state shall deny to any person within its jurisdiction the equal protection of the laws."